BAIL IN SINGAPORE

By S. Chandra Mohan
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This is a revised edition of the thesis submitted for the degree of LL.M. in the University of Singapore. It gives a clear and interesting account of the working of the bail system in Singapore. The author has the advantage of having been the District Judge of Singapore and he was able to conduct a bail project in the Magistrate's courts in Singapore. Although the book purports to deal with the law and practice in Singapore, there are constant references to the statutory provisions and the decisions of the courts in Malaysia. This review shows how relevant and important the book is for an understanding and appraisal of the system of bail in Malaysia.

It is a pity the author did not include a bibliography to the book. This has made it quite difficult to trace the references to the relevant literature. Also only a table of Singapore and Malaysian cases is included, although there are many relevant and important Indian cases referred to in the text.

Chapter 1 of the book deals with the meaning and nature of bail and the history of bail in Singapore.

Chapter 2 of the book deals with the apparent conflict between public and private interests in the matter of bail and the purpose of bail. Reference is made to the Manhattan Bail Project undertaken by the Vera Foundation in the United States, the results of which "suggest that in ascertaining the probability of appearance of accused persons at their trial, community roots as represented by previous criminal records, family ties, job stability and residence within the jurisdiction are at least relevant factors." In footnote 89 at page 30 the authors of the interim report should be "Ares Rankin and Sturtz". Reference could also have been made in this chapter to the article of Miss Ares Rankin on "The Effect of Pretrial Detention" in 39 N.Y.U.L.641, which is in fact referred to subsequently in the book in Chapter Eight (p.165f.) In this chapter the author refers only to the research projects undertaken in the United States. Reference could also have been made to the studies in England of the Home Office Research Unit (incidentally referred to at p. 109–113 and p. 166 of the book) and of Justice, the British section of the International Commission of Jurists (See "Time Spent Awaiting Trial", London 1960 and the New Law Journal June 16, 1966, p. 954); and of the Cobden Trust and Prof. Zander (referred to at pp. 109–114 of the book).

In footnote 94 at p. 31, Mohamed Arif should read "Mohamed Ariff".

Chapter 3 deals with bailable offences. The point is made that where a person is accused of a bailable offence he shall be released on bail. Even in Singapore it appears Magistrates sometimes overlook this fact and refuse bail in such cases (see p. 110 of the book). In Malaysia a project paper written by Mr. Teh Boon Eng has shown that from his examination of 2124 cases in Kuala Lumpur 340 persons were charged with bailable offences, and that of these 15 were refused bail (11 of those remanded were charged with the offence of resisting arrest under S. 224 of the Penal Code).[1] The author refers to the *lacuna* in the Code, as it does not provide for the cancellation of a bail in the case of a person accused of a non-bailable offences. Reference is made to the Indian Supreme Court cases of *Talab Haji Hussain* v. *M.P. Mondkar* AIR 1958 S.C. 376 and *Hazari Lal* v. *Rameshwar Prasad* AIR 1972 S.C. 484 which suggest that recourse might be had to the inherent power of the court referred to in S. 561A of the Indian Code and perhaps in section 4 of the Singapore and Malaysian Codes. In Singapore power is given to the High Court to cancel bail under S. 351(2) of the Code but there is no equivalent provision in the Malaysian Code.

Chapter 4 deals with non-bailable offences. In the section dealing with offences punishable with death or life imprisonment the author refers to the Malaysian cases which have laid down that the general rule is that the court should not grant bail to a person charged with such offences, unless there are exceptional and very special reasons. He also refers at p. 54 to the case of *Ada't bin Taib* v. *P.P.* (1959) M.L.J. 245 where Neal J. made a valiant attempt to re-assert that there must be reasonable grounds for believing the guilt of the accused before bail is refused; but perhaps he should have made it clear that that case was dissented from in the latter case of *Chinnakaruppan* v. *P.P.* (1962) M.L.J. 234. At page 49 he describes the decision of Pawan Ahmad J. in *P.P.* v. *Latcheny* (1967) 2 M.L.J. 79 as "unsatisfactory" and later at p. 99 he says "This decision in effect negates the proviso to section 349(1) (Malaysian Code S. 388(i)) and makes it virtually impossible for a woman to rely upon her sex or maternal obligations to qualify for bail, at least on a charge of murder".

In the recent Malaysian case of *Che Su binte Daud* v. *P.P.* (1978) 2 M.L.J. 162 the facts were that the accused was charged together with her husband and brother for trafficking in dangerous drugs under S.39(B)(1)(a) of the Dangerous Drugs Ordinance, an offence punishable with death or imprisonment for life. The accused was the mother of six children, the youngest of whom was still breast-feeding. The learned President of the Sessions Court refused bail but on application to the High

[1] Teh Boon Eng Custody Pending Trial – Sentence and the Bail System in the Lower Courts, Faculty of Law Project Paper, 1976, p. 39.

Court, although the learned Judge held a Judge should not (save for exceptional and very special reasons) grant bail in such cases, he granted bail in the circumstances of the case. The learned Judge agreed that "the fact that the accused was breast-feeding a child was not an exceptional or very special reason for granting bail", but distinguished the case from *Latchemy's case*, as here the accused was not charged alone but jointly with her husband and brother. The aftermath of this case is of interest. It appears that on the 4th January 1978 the Customs Officer prosecuting the case withdrew the case against the accused and her husband saying there was no evidence against them (Straits Times, January 5, 1979).

An interesting point which appears not to have been fully discussed in the cases or in the book is the question whether "such offence" in the proviso to section 349(1) of the Singapore Code (section 388(1) of the Malaysian Code) refers to a "non-bailable offence" or an "offence punishable with death or imprisonment for life". In *P.P. v. Latchemy* it seems that the Court construed the proviso as creating an exception to the rule that bail should not be granted to a person charged with an offence punishable with death or imprisonment for life. However the court went on to say that "the exception is a discretion which should be exercised sparingly and judiciously depending on the reasons of each particular case" and referred to the cases of Re *K.S. Menon* (1946) M.L.J. 49 and *R. v. Ooi Ah Kow* (1952) M.L.J. 95 which do not deal with cases covered by the proviso. The fact that the accused was a woman was not regarded as an exceptional or special reason and it was held that the learned Magistrate was wrong in granting her bail. In the case of *Che Su binti Daud v. P.P.* (1978) 2 M.L.J. 163 bail had been refused by the learned President of the Sessions Court and the application was made to the High Court under S. 389 of the Malaysian Code (S.351(1) of the Singapore Code). It was held that although a Judge has a discretion in granting bail, that discretion must be exercised judicially and he should not (except for exceptional and special reasons) grant bail if there appears reasonable grounds for believing that the accused has been quilty of an offence punishable with death or imprisonment for life. Such exceptional and special reasons were found to exist in *Che Su's case* and also in *Sulaiman bin Kadir's* case.

The case of *Sulaiman bin Kadir v. P.P.* (1976) 2 M.L.J. 37 is referred to in footnote 40 at p. 55 but perhaps this case should have been dealt with more fully, as in this case the High Court held there were exceptional and very special reasons and bail was granted.

In the Penal Code (Amendment and Extension) Act, 1976, (Act A327) the Legislature appeared to have made a valiant effort to liberalise the law and make a number of offences which were formerly punishable with life imprisonment (including rape and gang robbery) punishable with imprisonment for a term not exceeding twenty years. This could have the

effect of extending the discretion of the Court to grant bail in a large number of cases (where formerly the discretion was restricted) but unfortunately the attitude of the court so far has been negative.

The case of *Yanesengan and others* v. *Public Prosecutor* (1978) 1 M.L.J. 269 would be described as an 'unsatisfactory' case by the author. Here the accused had been charged with the offence of gang robbery under section 395 of the Penal Code. This offence was punishable with imprisonment for life before 1975 but by the Penal Code (Amendment and Extension) Act, 1975, was made punishable with imprisonment extending to twenty years. Nevertheless the High Court held that the nature and seriousness of these offences speak for themselves the necessity that the old rules before the amendment in the application for bail for offences punishable with life imprisonment must continue to apply if the administration of justice is to have any real effect. Bail should therefore, it said, be refused in such cases unless there are special reasons shown why bail should be granted.

In cases of offences not punishable with death or imprisonment for life the court has a complete and unfettered discretion in granting bail. The author deals with the exercise of discretion in such cases and the factors which may be considered in exercising the discretion, as well as factors which may not be considered. In this respect he includes the result of the study made by him of bail applications in Singapore. This was conducted between the 15th July 1968 and 15th January 1969. There was a total of 1521 accused persons who were brought before the Magistrate's Court. Of these 149 pleaded guilty at first appearance in Court and were summarily dealt with. Of the remaining 1372 persons, bail was granted in 1243 or 90.6% the cases and refused in 129 or 9.4% of the applications. An analysis of the factors which were stated by the courts to have been the reasons for refusal of bail showed —

Legal factors

Investigations incomplete	62 or 39.7%
Previous criminal record	28 or 16.8%
Likelihood of accused committing further offences	13 or 8.3%
Probability of absconding	5 or 3%
Gravity of offence	6 or 3.6%
Accused required to help in recovery of stolen goods	2 or 1.2%
Accused required for identification parade	2 or 1.2%
Probabllity of accused intimidating witnesses	2 or 1.2%

Non-legal factors

Non-bailable offence	21 or 12.6%
Offence prevalent	12 or 7.2%
Accomplice still at large	3 or 1.8%

The police objected to 136 out of the 1372 bail applications made. The Court refused bail in all except 7 of the 136 cases in which bail was approved. The factors which were considered by the court in making its bail decisions were similar to those upon which the police objected to bail.

The author points out that in India and in England the police give the magistrates information as regards their objections to bail from the witness stand, a procedure rarely adopted in Singapore or in Malaysia. The most impressive finding of the Bail study was that compared to the English studies, the police raised objections to bail in a very small proportion of the cases.

There appears to be an omission in the summary at p. 111 where the author states — "An analysis of all the 1,372 bail, applications and decisions showed that the court in 99.5% of the applications followed the recommendations of the prosecutor. Bail was granted in 100% of the cases in which the police did not object to bail and in 94.9% of the cases in which they did. Only in 5.1 of the cases were police objections to bail overruled".

The author deals with two interesting questions (a) whether a Magistrate can entertain successive bail applications and (b) whether a different magistrate can entertain a bail application where bail has been refused by a magistrate. He refers to some interesting cases in Singapore and points out that the point arose in *Latchemy's Case*, where after the President of the Sessions Court had allowed bail, a magistrate held that he had no power to overrule the decision of the President. The Public Prosecutor appealed against both this order and the original order granting bail to the accused. The High Court allowed both appeals (which were heard together) but did not give reasons for allowing the second appeal.

The author refers to the Criminal Justice (Temporary Provisions) Act, in Singapore which in effect prohibits the release on bail of any person charged with a scheduled offence except on the application of the Public Prosecutor or a Deputy Public Prosecutor for such release. In Malaysia we have had a number of Acts recently where the discretion of hte courts has been fettered in this way. Thus under section 41B of the Dangerous Drugs Ordinance, 1952 (added by Act A426 of 1978) it is provided that bail shall not be granted to an accused person charged with an offence under the Ordinance where the offence is punishable with death or with imprisonment for more than five years and also where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person. The provisions of the section are to apply notwithstanding any other written law or any rule of law to the contrary. Similarly by section 12 of the Firearms (Increased Penalties) Act, 1971 (substituted by Act A427 of 1978) it is provided that bail shall not be allowed to a person accused of an offence under the Act and that this provision shall apply

notwithstanding any other written law or any rule of law to the contrary.

Chapter 5 of the book deals with the raison d'etre of bailable and non-bailable offences. The author points out with reference to the Schedule to the Code that the severity of the offence appears not to be the sole criterion for the division into bailable and non-bailable offences. The offences of counterfeiting a device or mark used for authenticating a document (s. 475 Penal Code) and counterfeiting a government stamp (s. 255 Penal Code) are punishable with imprisonment for life but are stated to be bailable. Both these offences however are now punishable with imprisonment for a term not exceeding twenty years in Malaysia (see Act A 327/76). The offences of unlawful assembly and kindred offences, which in Singapore as the author points out, have been shuttled between the bailable and non-bailable list in the Schedule, have not suffered the same fate in Malaysia — offences under sections 143 and 151 of the Penal Code are non-bailable and those under sections 157, 158 and 353 are bailable.

Chapter 6 of the book deals with bail by police officers. In this chapter the author includes the result of his bail study. He concludes "It is obvious from the findings in the bail study that what principally influences police objections to bail is the fact that the accused is required by them for their investigations – to help trace accomplices, recover stolen goods or gather further evidence. The second most influential factor is the previous criminal record of the accused which is not by itself a bar to bail but is nevertheless relevant to gauge likelihood of the commission of further offences". He points out that these factors have also been found to be among the most important of the reasons for police objections to bail in England.

Chapter 7 of the book deals with bail pending appeal. The author points out that although in Singapore prior to 1972 the grant of bail pending appeal was the rule and refusal the exception, this has been changed as a result of the Singapore Courts following the decisions in Malaysia. In Malaysia it had been held that a stay of execution should not be granted unless there are special reasons for so doing and the mere fact that a notice of appeal has been given or that the accused believes he has good grounds for releasing an applicant does not constitute grounds for releasing an applicant on bail pending appeal (*Doraisamy* v. *P.P.* and *Re Kwan Wah Yip* (1954) M.L.J. 146). In *Ralph* v. *Public Prosecutor* (1972) 1 M.L.J. 242 the Singapore High Court followed the Malaysian cases "and so removed the differences that had long existed in the judicial approach to the discretion in the applications for bail pending appeal in Singapore and Malaysia".

At page 149 the writer mentions that there is a lacuna in the law in that there appears to be no powers to release on bail a person convicted of an offence who wishes to appeal to the Judicial Committee of the Privy Council. He refers to the Privy Council case of *Lala Jairam Das v. Emperor*

AIR 1945 P.C.94 where it was held that the bail provisions of the Code contain all the powers of the High Court as to the granting of bail and exclude the existence of any additional inherent powers on the subject. In Malaysia section 57 of the Courts of Judicature Act, 1964, gives the High Court and the Federal Court power to stay the execution of a judgement, order, conviction or sentence pending appeal on such terms as to security for the suffering of any punishment ordered by or in the judgement, order, conviction or sentence as to the court may seem reasonable. There seems however to be no power to grant bail to a person who wishes to appeal to the Yang Di Pertuan Agong. The matter is now academic as appeals in criminal cases to the Yang Di Pertuan Agong have been abolished but it might be noted that in the case of *Datuk Haji Harun bin Haji Idris and others* (1977) 2 M.L.J. 155 and (1978) 1 M.L.J. 240, the appellants were released on bail pending their appeals against the decisions of the Federal Court. It would appear that in these cases the bail bonds in respect of the Federal Court appeals were extended (see (1978) 1 M.L.J. cl).

Chapter 8 of the book deals with pre-trial detention. The author deals with the disadvantages suffered by the accused who is detained pending trial and refers to the studies in America and Canada which seem to suggest a relationship between pre-trial custody and conviction and sentence. He points out that no similar studies have been conducted in Singapore and suggest that the relationship suggested may not exist in Singapore.

In a study made of the practice of the subordinate courts in Kuala Lumpur, Mr. Teh Boon Eng[2] came to the conclusion that "it can be said that custody either pending trial or sentence can have far reaching effects on the accused persons. Such a person was less likely to be acquitted of the charge than if on bail. On conviction a remanded accused was most likely to get a custodial sentence. In respect of an accused who pleaded guilty, a remand had the effect of reducing his chances of a non-custodial sentence. Further when a fine was imposed by the court, 85% of remanded accused persons were unable to pay the fine."

Chapter 9 of the book deals with remedies. While as the writer points out the Malaysian Code specifically provides for a right of appeal against a bail or custody order, this is not the case in Singapore or in India. However even in Malaysia as pointed out in *Sulaiman bin Kadir* v. *P.P.* (1976) 2 M.L.J. 37 the more speedy procedure under section 351 is to be preferred. In regard to habeas corpus the author refers to the case of *Lee Beow Sim* (the correct reference to which is (1930) S.S.L.R. 70) in which it was held that the jurisdiction of the court in Singapore in habeas corpus existed

[2] *Ibid.* p. 101.

independently of statute, though the procedure might be regulated by statute, as it was by the Criminal Procedure Code. This may not be applicable in Malaysia – see *Zainab binte Othman* v. *Superintendent of Prison, Pulau Jerejak, Penang* (1975) 2 M.L.J. 221.

The last Chapter of the book deals with the author's conclusions. At page 188 he refers to a point not sufficiently dealt with in the earlier part of the book. He says "An examination of the bail decisions during the period of the bail study revealed that the amount of bail was soley fixed according to the gravity of the crime e.g. $500 for offences of theft, causing hurt, cheating, possession of offensive weapons and $1,000 for causing grievous hurt, rash and negligent driving. Courts ought to make more detailed inquiries as to the means of an accused person to raise the amount of bail that is proposed to be set. The amount of bail "offered" by the prosecutor is invariably accepted, often with disregard to the statutory direction that the bail should be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested. This has created a problem of bail raising rather than bail getting." The analysis of the reasons for detention of pretrial detainees given at p. 189 shows that a large percentage are detained because of inability to raise bail.

A detailed study has been made by Mr. Tan Boon Eng[3] of the practice in the subordinate courts in Kuala Lumpur. He states that "the amount of bail set by Presidents and Magistrates was found to be standardised according to the offence and its gravity. Very little attention is given to individual differences between accused persons." His finding is that 58.9 per cent of the accused persons who were granted bail were unable to meet the condition of providing a surety for the bail amount. The securing of bail is an enviable task especially if there is objection from the Prosecuting Officer but the next stage of satisfying bail conditions may no less be fraught with hazards and obstruction". He concludes "it may be observed that the principal criterion employed by Magistrates and Presidents in determining the bail amounts is the nature and gravity of the charge. It would seem that other factors like the ability of the accused to provide a surety is largely ignored. All too often bail amounts are directly related to the nature of the charge. At all amounts of bail accused persons who had claimed trial were better able to find sureties of the amounts required. Remands in the subordinate courts occur mainly because of the inability of the accused persons to provide a surety for the bail amount".

The author refers to the difficulties experienced by the police in effecting service of traffic summons. A more effective method in Singapore is the ticketing system which was first introduced in 1968 for offences under the Environmental Public Health Act, 1968 and extended to traffic offences in 1971.

[3] *Ibid.* p. 88

It might be useful to refer to the present position in England. There as the result of the recommendations of the Home Office Report of the Working Party entitled Bail Procedures in Magistrates Courts, 1974, a new Act the Bail Act, 1976, has been enacted. Bail no longer depends on recognisances. Under the Act a person who is granted bail is required to surrender at the time and place named; failure to do so is a criminal offence punishable in a magistrate's court by up to three months' imprisonment and a fine of £400/- and in a higher court by twelve months' imprisonment and a fine that has no limit. The person may be required before release on bail to provide a surety or sureties to secure his surrender to custody. If it appears that he is unlikely to remain in Great Britain until the time appointed for him to surrender to custody he may be required before release on bail to give security for his surrender to custody. He may be required by a court to comply before release on bail or later with such requirements as appear to be necessary to secure that (a) he surrenders to custody; (b) he does not commit an offence while on bail; (c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person; (d) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence. Except as so provided no security or sureties may be required or condition imposed upon him. The Act prescribes clearly and carefully formulated grounds for withholding bail. A defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant if released on bail would (a) fail to surrender to bail; or (b) commit an offence while on bail or (c) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person. In making its decision the court shall have regard to such of the following considerations as appears to it to be relevant –

(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it).
(b) the character, antecedents, associations and community ties of the defendant,
(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings.
(d) except in the case of a defendant whose case is adjourned for inquiries or report the strength of the evidence of his having committed the offence or having defaulted as well as to any others which appear to be relevant.

Bail decisions must be recorded and the court must state the reasons if bail is withheld or conditions are attached to the grant of bail. If bail is withheld, the magistrates must inform an unrepresented defendant of his right to apply to a higher court for bail.

Finally reference might be made to the decision of the Supreme Court of India in *Babu Singh* v. *State of Utter Pradesh* AIR 1978 S.C. 527. In that case the Supreme Court was dealing with an application for bail in a case where the High Court had on appeal convicted the appellants for an offence under section 302 of the Penal Code and sentenced them to life imprisonment and where the appellants had appealed to the Supreme Court. Krishna Iyer J. in the Supreme Court dealt with the principles on which bail should be granted or refused. He said –

> "The correct legal approach has been clouded in the past by focus on the ferocity of the crime to the neglect of the real purposes of bail or jail and indifferent to many other sensitive and sensible circumstances which deserve judicial notice. The whole issue, going by decisional material and legal literature has been relegated to a twilight zone of the criminal justice system. Courts have often acted intuitively or reacted traditionally, so much so the fate of applicants for bail at the High Court level and in the Supreme Court, has largely hinged on the hunch of the bench as an expression of 'judicial discretion'. A scientific treatment is the desideratum.
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> The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden on the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court[4] I had to deal with this uncanalised case flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Art. 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by 'law'. The last four words of Art. 21 are the life of that human right.
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> The doctrine of Police Power, constitutionally validates punitive processes for the maintenance of public order, security of the State, national integrity and the interest of the public generally. Even so, having regard to the solemn issue involved, deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious conditions relevant to the welfare objectives of society specified in the Constitution.
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> What, then, is 'judicial discretion' in this bail context? In the elegant words of Benjamin Cardozo, "The judge, even when he is free, is still not

[4] AIR 1978 S.C. 429.

wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'. Wide enough in all conscience is the field of discretion that remains." (The Nature of Judicial Process – Yale University Press (1921)).

Even so it is useful to notice the tart terms of Lord Camden that

> "the discretion of a judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice folly and passion to which human nature is liable . . ." (1 Bovu. Law Dict. Rawles' III Revision p. 685 quoted in Judicial Discretion National College of the State Judiciary, Redo, Navada p. 14).

Some jurists have regarded the term 'judicial discretion' as a misnomer. Nevertheless, the vesting of discretion is the unspoken but inescapable silent command of our judicial system, and those who exercise it will remember that:

> "discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular." (Attributed to Lord Mansfield *Tinglay* v. *Dolby*, 14 N.W. 146). "An appeal to a judge's discretion must be exercised, not in opposition to, but in accordance with, established principles of law." (Judicial discretion, (ibid) p. 33).

Having grasped the core concept of judicial discretion and the constitutional perspective in which the court must operate public policy by a restraint on liberty, we have to proceed to see what are the relevant criteria for grant or refusal of bail in the case of a person who has either been convicted and has appealed or one whose conviction has been set aside but leave has been granted by this Court to appeal against the acquittal. What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russell, C.J. said:

> "I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial."

(*R.* v. *Rose* – 1898 – 18 Cox CC.717; 67 LJQB 289 – quoted in 'The granting of Bail', Mod. Law Rev. Vol. 31, Jan. 1968 pp. 40, 48).

This theme was developed by Lord Russell of Killowen C.J., when he charged the grand jury at Salisbury Assizes, 1899:

> ". . . it was the duty of magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear, for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings with which to fly from justice." (1899) 63 J.P. 193, Mod. Law Rev. p. 49 ibid).

In Archbold it is stated that:

"The proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial . . .

The test should be applied by reference to the following considerations:

(1) The nature of the accusation . . .
(2) The nature of the evidence is support of the accusation . . .
(3) The severity of the punishment which conviction will entail . . .
(4) Whether the sureties are independent, or indemnified by the accused person . . .

(Mod. Law Rev. ibid. p. 53 – Archbold, Pleading Evidence and Practice in Criminal Cases, 36th edn., London, 1966 para 203).

Perhaps, this is an overly simplistic statement and we must remember the constitutional focus in Arts. 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a growing awareness that the working of the bail system requires a second look from the point of view of correct legal criteria and sound principles, as has been pointed out by Dr. Bottomley. (The Granting of Bail: Principles and Practices: Mod. Law Rev. ibid pp. 40 to 54).

Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erle J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the court may reasonably presume, some evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged (Mod. Law Rev. p. 50 ibid, 1852–1. E & B1). Lord Campbell C.J. concurred in this approach in that case and Coleridge J. set down the order of priorities as follows:

"I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial ... It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a determination on that point three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted. In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death." (Mod. Law Rev. ibid, pp. 50–51).

It is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being. (Patrick Devlin. The Criminal Prosecution in England (London) (1960) p. 75 – Mod. Law Rev. ibid p. 54). Thus the legal principle and practice validate the court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he had a bad record – particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance.

The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Art. 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice to the individual involved and society affected.

We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It

makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. In the United States, which has a constitutional perspective close to ours, the function of bail is limited, 'community roots' of the applicant are stressed and, after the Vera Foundation's Manhattan Bail Project, monetary suretyship is losing ground. The considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible.

A few other weighty factors deserve reference. All deprivation of liberty is validated by social defence and individual correction along an anticriminal direction. Public justice is central to the whole scheme of bail law. Fleeing justice must be forbidden but punitive harshness should be minimised. Restorative devices to redeem the man, even through community service, meditative drill, study classes or other resources should be innovated, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned 'free enterprise', should be provided against. No seeker of justice shall play confidence tricks on the court or community. Thus, conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our Constitution. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding – if that be so – of innocence has been recorded by one court. It may be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate repraisal, if enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the court into a complacent refusal.

Realism is a component of humanism which is the heart of the legal system. We come across cases where parties have already suffered 3, 4 and in one case (the other day it was unearthed) over 10 years in prison. These persons may perhaps be acquitted — difficult to guess. If they are, the injustice of innocence long in rigorous incarceration inflicted by the protraction of curial processes is an irrevocable injury. And, taking a pragmatic view, while life imprisonment may, in law, last a whole life; in practice it hardly survives ten years, thanks to rules of remission. Thus, at the worst, the prisoner may have to serve some more years, and, at the best, law is vicariously guilty of dilatory deprivation of citizen's liberty, a consummation vigilantly to be vetoed. So, a circumstance of some consequence, when considering a motion for bail, is the period in prison already spent and the prospect of the appeal being delayed for hearing, having regard to the suffocating crowd of dockets pressing before the few Benches.

It is not out of place to mention that if the State takes up a flexible attitude it may be possible to permit long spells of parole, under controlled conditions, so that fear that the full freedom if bailed out, might be abused, may be eliminated by this experimental measure, punctuated by reversion to prison. Unremitting insulation in the harsh and hardened company of prisoners leads to many unmentionable vices that humanizing interludes of parole are part of the compassionate constitutionalism of our system.

The basics being thus illuminated, we have to apply them to the tangled knot of specifics projected by each case: The delicate light of the law favours release unless countered by the negative criteria necessitating that course. The corrective instinct of the law plays upon release orders by strapping on to them protective and curative conditions. Heavy bail from poor man is obviously wrong. Poverty is society's malady and sympathy, not sternness, is the judicial response.

Yet another factor which heavily tips the scales of justice in favour of release pendente lite is the thought best expressed by Justice Bhagwati, speaking for the Court in *Kashmira Singh* v. *The State of Punjab* AIR 1977 SC 2147 at p. 2148.

> "The appellant contends in this application that pending the hearing of the appeal he should be realeased on bail. Now, the practice in this Court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under S. 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be alowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to

release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this court has been following in the past must be reconsidered and so long as this court is not in a position to hear the appeal of an accused within a reasonable period of time, the court should ordinarily unless there are cogent grounds for acting otherwise release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

Having regard to this constellation of considerations, carefully viewed in the jurisprudential setting above silhouetted, we are of the view that, subject to certain safeguards, the petitioners are eligible to be enlarged on bail."

Ahmad Ibrahim

THE CONSTITUTION OF MALAYSIA: ITS DEVELOPMENT: 1957–1977

ed. Tun Mohammed Suffian, H.P. Lee, F.A. Trindade:
Kuala Lumpur: Oxford University Press, 1978, 425 pp.

The Constitution of Malaysia came into force in 1957. Originally, it was known as the Constitution of Malaya. Since 1963, it has come to be known as the Constitution of Malaysia. With some modifications and amendments, the Constitution has maintained its continuity since 1957 and, thus, it has completed 20 years of its existence in 1977. The book under review seeks to record the main developments in the Malaysian Constitution during this period in its various aspects. The idea of compiling a book of this nature originated, in the first instance, with Mr. Lee and Mr. Trindade, both law teachers at the Faculty of Law, Monash University, Australia.

During this period of 20 years, the Constitution of Malaysia has not stood still. There have been immense socio-economic and political changes in the country during this period. Two five year plans have been completed and the third plan has reached its mid-half. Accordingly, the Constitution has also undergone quite a few changes, some of which are quite fundamental in nature. Despite the many amendments, in the words of Tun Suffian in the foreword to the book, the Constitution "is still recognizable by its makers". It may be of interest to note at the outset that, unlike many other constitutions such as those of the U.S.A. and Australia, where constitutional changes occur imperceptibly through the process of judicial interpretation and the growth of conventions, the changes in the Malaysian Constitution have been brought about principally by the process of constitutional amendments. The amending process has been rather easy to invoke in Malaysia as against the great difficulty of consummating a constitutional amendment in the U.S.A. or Australia. More on this point later in this review.

The book under review is a collection of 15 essays written on various aspects of the Malaysian Constitution by various contributors who form a mixed bag – academics, practising lawyers and administratiors. This greatly enhances the value of the book as it represents various angles, approaches and points of view on various constitutional issues. This reviewer heartily welcomes this latest addition to the not so profuse literature on the Constitution. The book will fill a gap in the literature on the subject.

Malaysian Constitution. The book will fill a gap in the literature on the subject.